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91-2015

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER AND MATTHEW RYAN
Petitioners,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commission, Elections, and Legislation, Department of State, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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June 8, 1992

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QUESTIONS PRESENTED

Does a court, in adopting a statewide congressional redistricting plan, violate a duty, recognized by other state and federal courts, to provide a full and fair hearing and to protect the rights of the absent but affected public, when it limits itself to considering only plans submitted by political factions within a twelve-day notice period, closes the record four days thereafter and rejects without consideration plans with lower population deviations than its selected plan?

Does a court, in adopting a congressional redistricting plan that substantially shifts minority populations, violate a duty, recognized by other state and federal courts, when it fails to make an affirmative and substantial inquiry under the Voting Rights Act into the impacts of redistricting on minority populations?

May a state court, in adopting a congressional redistricting plan, ignore the policies of the last legislatively-enacted plan, when a federal court with concurrent jurisdiction over the same federal question would be required to defer to such policies under *White v. Weiser*?

May a state court, in adopting a congressional redistricting plan, treat concerns, such as minimizing the splitting of municipal boundaries and making districts compact, as general, *per se* justifications for higher-than-practicable population deviations, when, under *Karcher v. Daggett*, a federal court would entertain such factors as justifications only upon a proper showing and only for legislatively-enacted plans?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioners[1] and Respondents named in the caption, the parties include:

Plaintiffs Below: Robert J. Mellow, Minority (Democrat) Leader of the Senate of Pennsylvania; J. William Lincoln, Minority (Democrat) Whip of the Senate of Pennsylvania; Leonard J. Bodack, Minority (Democrat) Caucus Chairman of the Senate of Pennsylvania; Michael J. O'Pake, Minority (Democrat) Caucus Secretary of the Senate of Pennsylvania; Patrick J. Stapleton, Minority (Democrat) Policy Committee Chairman of the Senate of Pennsylvania; Jeanette F. Reibman, Minority (Democrat) Caucus Administrator of the Senate of Pennsylvania; State Senator Vincent J. Fumo; and State Senator H. Craig Lewis, ("Plaintiffs").

Intervenors Below: Robert W. O'Donnell, Speaker (Democrat) of the Pennsylvania House of Representatives; H. William DeWeese, Majority (Democrat) Leader of the Pennsylvania House of Representatives; Allen G. Kukovich, Chairman of the Majority (Democrat) Policy Committee of the Pennsylvania House of Representatives; State Representative Dwight Evans; State Representative Frank Oliver; State Representative Thomas Michlovic; State Representative Gordon J. Linton; and State Representative Harold James, ("O'Donnell Intervenors");

Congressman Joseph M. McDade; Congressman John P. Murtha, ("McDade/Murtha Intervenors");

State Representative Robert L. Freemen; State Representative Karen A. Ritter; and State Representative Katherine McHale, ("Lehigh Valley Intervenors");

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[1] Petitioners include members of the Majority (Republican) Leadership of the Senate of Pennsylvania and the Minority (Republican) Leader of the Pennsylvania House of Representatives.

Grace L. Jarvis; Margaret Tricarico; Alexandra Makosky; and John H. Broujos, ("Broujos Intervenors");

State Representative Roy W. Cornell;

State Senator David J. Brightbill;

Albert Swann; the Frederick Douglas Society; and the Philadelphia Leadership Conference ("Swann Intervenors");

State Senator James C. Greenwood; Andrew L. Warren; Mark S. Schweiker; and Sandra A. Miller ("Greenwood Intervenors");

Edward J. Wilkes, Jr., Township of Upper Merion; Barbara Frailey; William M. Wall; William M. Keim, III; Justus C. Barber; Patricia Anne Buard; and Russell U. McLaughlin ("Upper Merion Intervenors");

Congressman Lucien C. Blackwell.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

The Petitioners, F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore, Noah Wenger and Matthew Ryan, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this matter on March 10, 1992.

OPINIONS BELOW

The March 27, 1992, Opinion of the Supreme Court of Pennsylvania, in support of its March 10, 1992 Order, has not been officially reported at this time. The Order and Opinion are set out in the Appendix at A1.

JURISDICTION

The Pennsylvania Supreme Court's Order was entered on March 10, 1992.

The jurisdiction of this Court to review the decision of the Supreme Court of Pennsylvania is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are: U.S. Const. art. I, §2, cl. 3; U.S. Const. art. I, §4, cl. 1; U.S. Const. amend. XIV; U.S. Const. amend. XV; 42 U.S.C. §1973; Pa. Const. art. II, §16; Pa. Const. art. II, §17; 2 U.S.C. §2a; and 25 P.S. §3571. Pursuant to Supreme Court Rule 14.1(f), the texts of constitutional and statutory provisions involved in this case are set out in the Appendix at A108.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Plaintiff, Democrat State Senators commenced this case by filing a complaint and a motion for a preliminary injunction in the Commonwealth Court of Pennsylvania on January 28, 1992, docketed at No. 25 M.D. 1992. The complaint requested the court: (1) to declare unconstitutional section 1802-A of the Pennsylvania Election Code, Act of June 3, 1937, *as amended*, 25 P.S. §3571, the statutory provision enacted in 1982 detailing congressional districts; (2) to enjoin implementation of the Pennsylvania primary election schedule; and (3) to adopt a congressional redistricting plan if the General Assembly failed to do so by February 11, 1922.

On January 30, 1992, Senior Judge Francis A. Barry of the Commonwealth Court issued an order enjoining the Respondents, state election officials, from implementing the election schedule and requiring any person wishing to submit proposed congressional reapportionment plans to intervene in the action and to submit proposed congressional redistricting plans to the Commonwealth Court by February 11, 1992 ("Preliminary Injunction Order"). (Appendix at A100.) By order dated February 12, 1992, Commonwealth Court President Judge David W. Craig set a hearing to consider the congressional redistricting plans submitted, which was to begin at 10 A.M. on February 13, 1992 and continue

through February 15, 1992. (Appendix at A102.) Subsequent to the hearing, Petitioners (referred to in the state court proceedings as "Loeper Intervenors") filed an answer to the complaint, raising the issues of: (1) compliance of any redistricting plan with the Voting Rights Act; (2) the necessity for a full and fair hearing; and (3) the necessity of fully considering all plans tendered to the court. (Appendix at A149.)

On February 13, 1992, the Pennsylvania Supreme Court issued a *per curiam* order assuming plenary jurisdiction of the action, appointing President Judge Craig a master, and ordering him to file a master's report by February 26, 1992. (Appendix at A106.) President Judge Craig filed the Master's Report on February 24, 1992. (The Master's Report is appended to the March 26, 1992 opinion of the Supreme Court of Pennsylvania, Appendix at A16.) On March 3, 1992, the Pennsylvania Supreme Court set March 7, 1992 for oral argument on the exceptions to the Master's Report. (Appendix at A107.) The Pennsylvania Supreme Court issued an order accepting the Recommendation of the Master on March 10, 1992 and filed its opinion in support thereof on March 26, 1992. (The March 10 order, Appendix at A72, is appended to the March 26, 1992 opinion, Appendix at A1.)

There were concurrent related proceedings in the United States District Courts for the Middle and Eastern Districts of Pennsylvania, where three separate actions concerning Pennsylvania's congressional reapportionment were filed. The first two actions (Nerch v. Mitchell, Middle District Docket No. 3:CV-92-95, and Barness v. Mitchell, Eastern District Docket No. 92-CV-593, which was transferred to the Middle District and initially docketed at 1:CV-92-0155) were filed on January 29, 1992. The third action (Ryan v. Mitchell, Middle District Docket No. 1:92-CV-0166) was filed February 14, 1992. These actions were assigned to the same three-judge panel, were consolidated in the Middle District at Docket No. 3:92-CV-95, captioned Nerch v. Mitchell, were stayed pending action by the Pennsylvania Supreme Court, and were heard in a trial on the merits on March 29, 30, and

31, 1992. At the trial the three-judge panel heard evidence relating to the validity of the plan being implemented by the respondent state election officials pursuant to the order of the state supreme court. The panel has not yet decided the case.

B. FACTUAL HISTORY

The last congressional redistricting in the Commonwealth of Pennsylvania, enacted by its General Assembly in 1982, provided for twenty-three congressional districts. See section 1802-A of the Pennsylvania Election Code, 25 P.S. §3571. Based on 1990 census data, the Clerk of the House of Representatives of the United States, in December 1990, issued a Certificate of Entitlement to the Secretary of the Commonwealth, which reduced Pennsylvania from twenty-three to twenty-one congressional districts. The census data also showed that changes of population since the 1980 census had resulted in congressional districts with populations varying as much as 19.8%.

The General Assembly of the Commonwealth was therefore required to redistrict the Commonwealth to reflect the decrease in congressional districts and the changes in population. The General Assembly has not yet enacted a redistricting plan. A plan with zero deviation from the ideal, i.e. with districts of equal population, would have 565,793 people in each district.

On February 13, 1992, at the beginning of the hearing and before taking evidence, Judge Craig stated he would consider three proposed plans from the Mellow Plaintiffs (Mellow Plans 1, 2, & 3) (one of which was later withdrawn), two proposed plans from O'Donnell Intervenors (O'Donnell Plans A & B), one plan from McDade/Murtha Intervenors (McDade/Murtha Plan), and one plan from Loeper Intervenors (Loeper Original Plan). The Loeper Intervenors were also permitted at that time to proceed at the hearing with evidence on an amended version of their plan (Loeper Amended Plan), that had lower population deviation than the plan ultimately adopted by the court. A plan with near zero population

deviation (.0000265% maximum deviation; .0000025% average deviation), offered by Petitioner Ryan and State Representative Cornell was excluded at the outset because it was submitted to the court one day after the February 11, 1992 deadline established in the court's order twelve days earlier. (Transcript, Vol. 2-B at 129-30, 132-33, Appendix at A136.)

Testimony on the various plans was heard over the next three days. The Master also heard evidence from groups with concerns about the impact of reapportionment on specific regions of the Commonwealth.

At the end of the hearing, on Saturday, February 15, 1992, Judge Craig ruled that the evidence submitted regarding the Loeper Amended Plan, which had lower population deviation than the plan selected by the court (*See* Appendix at A147), would be used solely for the purpose of showing the deficiencies in the Loeper Original Plan. (Transcript, Vol. 3 at 137-44, Appendix at A136.) Plaintiffs, whose plan was ultimately selected, sought to introduce expert testimony concerning the voting rights impact of their plan but Judge Craig refused to permit the witness to be called. (Transcript, Vol. 3 at 209-10, 214, 222, Appendix at A142.) No voting rights experts testified on any of the plans accepted for consideration by the master.

Judge Craig stated that his report would recommend adoption by the Pennsylvania Supreme Court of one of the admitted plans and that he would not attempt to design a plan. (Transcript, Vol. 2-A at 8-9, Appendix at A135.)

Judge Craig issued his Master's Report on February 24, 1992. In their exceptions (Appendix at A150), Loeper Intervenors raised the issues of: (1) a lack of a full and fair hearing due to the exclusion of plans (exceptions 1-3 and 12); (2) the failure of the Master to ensure that the adopted plan complied with the Voting Rights Act (exceptions 5-6); and (3) use of an improper standard for selecting a court adopted plan (exceptions 7-10). These issues

were also raised by Loeper Intervenors at oral argument before the Pennsylvania Supreme Court on March 7, 1992.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Pennsylvania adopted a congressional redistricting plan in a manner that deprived the parties of a full and fair hearing, that failed to protect the rights of the public, that is in conflict with the duty recognized by other courts, and that presents an important question regarding the proper exercise of a court's equity powers in a case involving fundamental constitutional rights.

In adopting a statewide congressional redistricting plan, the Supreme Court of Pennsylvania refused to consider any plan not filed during a twelve-day period set by a preliminary injunction order. The court refused to consider even amendments to filed plans that would have improved them. The court also refused to consider, through its Master or otherwise, drafting any alternative plans of its own.

As a result, the redistricting plans considered by the court were limited to two plans submitted by the Mellow Plaintiffs, who are members of the State Senate Democrat Caucus, two plans submitted by State House of Representatives Democrat Caucus members, one plan submitted by Republican State Senators (Petitioners here) and one plan submitted by certain incumbent Congressmen.

Although Petitioners were not parties at the time the Preliminary Injunction Order set a twelve-day deadline for filing plans, they managed to meet the deadline by filing a plan they had introduced in the State Senate. They were, however, penalized at the conclusion of the hearing for amending their plan to reduce the

population deviation to .00954 percent maximum deviation, which is lower than the maximum deviation of the plan selected by the court. (See Appendix at A147.) The Supreme Court of Pennsylvania did not disturb the ruling of its Master that this amended plan would be used "for the sole purpose of showing the deficiencies in the [Petitioners'] original plan." (Appendix at A140.) The superior amended plan offered by Petitioners was not even used by the court to compare the merits or deficiencies of the other plans accepted for consideration, but was used solely to penalize Petitioners.

In addition to rigidly enforcing the 12-day window for filing plans, the state court accelerated and compressed to an extraordinary degree the proceedings for consideration of plans. One day after the deadline for filing plans, the court set a date for a hearing on the plans. Two days after the deadline for filing plans, the hearing began. The parties were severely limited in the number of witnesses they could call. Although each party was allowed to present evidence on the merits of its plan, the parties did not have an adequate opportunity to study competing plans, much less to develop evidence that would test the assumptions and contentions of competing plans. The court refused to allow rebuttal witnesses. Four days after the deadline for filing plans, the hearing ended and the record was closed. The court did not attempt to modify any of the submitted plans even slightly, or to correct errors, much less attempt to draft its own plan.

The Pennsylvania Supreme Court did not proceed "in a manner 'free from any taint of arbitrariness or discrimination'" as required by this Court. *Connor v. Finch*, 431 U.S. 407, 415 (1977) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). Nor did it assume any responsibility to ensure it obtained sufficient information to make a decision that the plan adopted met all constitutional, statutory and caselaw requirements.

The arbitrary exclusion of other options, and the haste with which it moved, practically assured that the Supreme Court of

Pennsylvania would not adopt the best plan that could be drawn for the Commonwealth. It also assured that the only players of substance in determining the outcome of redistricting would be, at most, a few political factions that had been aware of, or planning for, litigation. No responsibility was assumed to protect the rights of non-party voters. There was neither a full nor a fair hearing on a matter of great public importance.

The Supreme Court of Pennsylvania's arbitrary constriction of its options is contrary to the view of other state and federal courts that full and fair hearings, with ample opportunity for public participation, should be provided when a court adopts a plan.

The California Supreme Court, for example, recently adopted statewide congressional and legislative redistricting plans after a four-month process that included public hearings, which commenced within thirty days after the appointment of masters, and a thirty-day period of briefing and public comment following the filing of the masters' recommendations. *See Wilson v. Eu ("Wilson I")*, 816 P.2d 1306, 1307 (Cal. 1991). During this process, twenty-two (22) statewide congressional reapportionment plans were submitted to the California Supreme Court's masters. The California Supreme Court rejected all of these plans and accepted one drafted by its masters. *Wilson v. Eu ("Wilson II")*, 823 P.2d 545 (Cal. 1992). The foundation of this careful process is the California Supreme Court's recognition that, in reapportionment cases, it has not just a duty of fairness to the parties but a constitutional "duty to insure the electorate equal protection of the laws" that can only be fulfilled by affording all interested parties an opportunity to be heard. *Legislature v. Reinecke*, 492 P.2d 385, 389 (1972).

The three-judge panel that recently adopted a congressional redistricting plan for the state of Illinois, in *Hastert v. State Board of Elections*, 717 F.Supp. 634 (N.D. Ill. 1991), also chose to pursue a course of action that encouraged broad participation and the development of proposed plans that met constitutional and statutory

requirements.[2] The *Hastert* court consolidated three reapportionment actions and ordered publication, in six daily newspapers, of a notice which invited anyone desiring to participate to file a petition to intervene within twenty-eight days. The court later consolidated a fourth reapportionment action and proposed plan, filed a day after its intervention deadline, with the other actions. Discovery was allowed for more than a month afterwards. The many submitted plans were amended significantly before trial, eliminating major areas of conflict and leaving two proposed plans before the court, one of which was numerically precise.

The Supreme Court of Texas recently vacated a redistricting order entered by a lower court where a sufficiently open and public process was lacking for consideration of the public interest in finding the optimum redistricting plan. *Terrazas v. Ramirez*, No. D-1817, 1991 Tex. LEXIS 160 (Tex. Dec. 17, 1991). The court explained the duty of the trial court in dealing with apportionment cases:

> Apportionment affects every person in the state, yet only a very few parties can be involved in any lawsuit challenging redistricting. The trial court must attempt to consider the interest, not only of the parties in the case, but of others who are not present.

Id., at *20-21.

The Supreme Court of Texas analogized the reapportionment lawsuit with other types of cases, such as class action settlements and school desegregation cases, where "the individuals or groups to be protected are those who are not

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[2] The Circuit Courts of Appeals do not have jurisdiction over statewide reapportionment cases, which are heard by three-judge district court panels, with appeals directly to this Court. 28 U.S.C. §2284(a).

participants in the litigation but whose rights and interests are affected thereby." *Id.*, at *22.

When approving class action settlements, "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. . . . The court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate." *Grunin v. International House of Pancakes*, 513 F.2d 114, 125 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975) (citations omitted). As the Third Circuit recognized in *Grish v. Jepsen*, 521 F.2d 153 (3d Cir. 1975), when reviewing a class action settlement approved by the trial court:

> 'It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.'

Id. at 159 (quoting *Protective Committee v. Anderson*, 390 U.S. 414, 434 (1968)). The Third Circuit held that "the district court did not live up to its fiduciary responsibility, as guardian of the rights of the absentee class members in approving the settlement based upon the inadequate record before it." *Id.* at 157.

The haste with which the state court conducted and concluded the hearings, excluding any effort by the parties to improve or to expand its options, was also inconsistent with due process. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court stated that notice "must afford a reasonable time for those interested to make their appearance." 339 U.S. at 314. The decision in *Mullane* was relied upon by the Third Circuit in *Greenfield v. Villager Industries*, 483 F.2d 824 (3d Cir. 1973), to reject a thirty day proof of claim period as insufficient.

Pro forma gestures will not suffice for notice which affords an adequate opportunity to respond and to prepare. *Id.* at 834.

As the Supreme Court of Texas recognized, reapportionment cases have a much broader effect than merely resolving the conflict between the parties before the court. Therefore, a fiduciary duty, similar to that imposed on courts considering class action settlements and school desegregation cases, should be imposed on courts dealing with reapportionment cases. The conduct of the state court proceedings in this case were inconsistent with such a duty. The duty should be no less rigorous for a state court than for a federal court since fundamental federal constitutional rights are at stake.

This Court should consider whether any court entertaining the adoption of a reapportionment plan must take affirmative steps to obtain all information needed to assure that the plan complies with constitutional, statutory and caselaw requirements. This Court should consider whether it is sufficient for a court, whether state or federal, to play only the role of a referee, allowing competing parties to limit a court's options by the way they frame their proposals. Petitioners suggest that, since a court must do more in mere commercial class action litigation, it is inconceivable that a court may be less protective in cases involving constitutional rights of the public.

II. The Supreme Court of Pennsylvania's failure to make an affirmative and substantial inquiry into the impacts of redistricting under the Voting Rights Act conflicts with the duty recognized by other courts and presents important questions of federal law which have not been, but should be, settled by this court.

The Supreme Court of Pennsylvania adopted a plan that: (1) reduced the African-American population percentage in

Pennsylvania's only previous majority-minority congressional district (i.e., district in which African-Americans were an effective majority of the voters) by 19 percentage points; (2) increased the African-American population in an adjacent congressional district, so that, for the first time, a second congressional district in Pennsylvania would have more than a 50 percent African-American population; and (3) diluted the African-American population in Pittsburgh's Fourteenth Congressional District from its previous level of approximately 23 percent to approximately 17 percent. Each of these three actions was handled in a manner that conflicts with the duty recognized by other courts of studying the impact of such drastic shifts.

The retrogression of African-Americans in Philadelphia's Second Congressional District was done over the opposition of the incumbent African-American Congressman. (Appendix at A35.) The court reduced the African-American population in this district below the 65 percent level that has been generally accepted by the federal courts as a benchmark or guideline for the effectiveness of minority representation. *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). No expert testimony was heard regarding the impact on the ability of African-American voters in this district to continue to have an opportunity to elect a congressman of their choice, as is their right under section 2 of the Voting Rights Act, 42 U.S.C. §1973. In fact, Mellow Plaintiffs themselves sought to offer testimony from an expert witness on this issue but were denied permission by the Master, who rigidly limited evidence at the hearing. (Appendix at A136-37, A142-46.)

Other courts that have addressed setting an appropriate minority population percentage for a district have made a point of obtaining extensive testimony and both statistical and expert evidence, that specifically addresses impacts within the configuration of the proposed districts. For example, in *Burton v. Sheheen*, 1992 W.L. 106354 (D.S.C. May 1, 1992), a three-judge court heard extensive expert testimony on voting rights issues from

experts with respect to the section 2 preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). This testimony consisted, in part, of testimony of racial polarization based on extreme case analysis and bivariate ecological regression, the type of expert analysis on which the Court relied in *Gingles*. The court, noting that it was not deciding whether the creation of a majority-minority district was mandated, adopted a congressional redistricting plan containing such a district, explaining:

> The application of [section] 2 to this case has its genesis in the admonition of the Supreme Court in Connor v. Finch, 431 U.S. 407, 425 (1977) that 'it is imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with the established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges.' It would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of §2.

1992 W.L. 106354 at *15.

The Pennsylvania Supreme Court's creation of the second African-American majority district in Philadelphia was based on its perception that "[w]hen possible, an increase in the number of minority-in-the-majority districts is constitutionally required," citing *Thornburg v. Gingles*, 478 U.S. 30 (1986). (Appendix at A34.) The Pennsylvania Supreme Court received no evidence on whether African-Americans in this district suffered any impairment of their opportunity to elect a representative of their choice. The court likewise heard no evidence on whether African-American voters in a district with this configuration would be an effective majority as

opposed to a numeric majority.[3] The lack of factual inquiry, though, would be immaterial if the Pennsylvania Supreme Court's view of federal law were correct.

The Pennsylvania Supreme Court's interpretation of federal law on this issue, however, is in conflict with that of the United States District Court for the Northern District of Ohio, where a three-judge panel recently held that the Voting Rights Act and federal precedent do not dictate such a *per se* requirement. *Quilter v. Voinovich*, No. 91CV-2219 (N.D. Ohio Jan. 31, 1992), *probable jurisdiction noted*, 1992 U.S. LEXIS 3271 (No. 91-1618, June 1, 1992). In *Quilter* a legislatively enacted plan was overturned by a panel that found no factual predicate for the creation of majority-minority districts.

In Pittsburgh's Fourteenth Congressional District, the Pennsylvania Supreme Court reduced the African-American population by one-fourth its former weight in the district, again without any affirmative inquiry into the consequences. The Court did not look at whether a cohesive minority voting group existed, whether it had achieved any influence in its district, whether its

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[3] As explained by the Seventh Circuit in *Ketchum*, 740 F.2d at 1415, experience has shown that a mere numeric majority may not protect minority voting rights:

> A guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice. This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%. This leads to a total target figure of 65% of total population.

influence would be diminished or destroyed, or whether racial block voting affected the group's influence.

As acknowledged by the California Supreme Court in *Wilson II*, 823 P.2d at 567-68, there is a split among the courts on the question of whether there can be a Voting Rights Act claim arising from a single-member district where a minority group does not constitute a majority of the population. The three-judge district court in *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), recognized that influence districts can exist and deserve consideration under the Voting Rights Act. The three-judge district court in *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D. Ill. 1991), disagreed with the *Armour* court, a position with which the Pennsylvania Supreme Court has tacitly aligned itself. *Also contra* on this issue is *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

The California Supreme Court resolved the issue for itself by assuming that all sizable minorities were cohesive as voting groups and by maximizing minority representation in every congressional district possible. *Wilson II*, 823 P.2d at 567-68.[4] By taking this approach, the California Supreme Court in *Wilson II* "endeavored to protect the combined group's voting potential in accordance with section 2 [of the Voting Rights Act]." 823 P.2d at 867. Pennsylvania's approach is in conflict with this.

Whether the formation of minority influence districts should be the subject of an affirmative inquiry under the Voting Rights Act by a court adopting a redistricting plan is an important question that this court should resolve in light of these ongoing differences of interpretation, which all focus on what this court

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[4] The California Supreme Court approved the Report and Recommendations of Special Masters on Reapportionment with regard to the Masters' interpretation of the Voting Rights Act and appended the Masters' Report to the Court's opinion. *See* 823 P.2d at 559.

meant in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as interpreted by *Chisom v. Roemer*, ___ U.S. ___, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).[5]

For all the Pennsylvania congressional districts with recognized minority populations, the common issue presented by the Pennsylvania Supreme Court's approach to redistricting is this: when a legislature has failed to enact a constitutional plan, must the court, in adopting its own plan, conduct an affirmative and substantial inquiry into the impact of redistricting on minority populations? The question is one of obvious public importance. As illustrated above, it is also one that calls for an answer from this court because of the disparate approaches in state and federal courts.

III. The Pennsylvania Supreme Court, in adopting a congressional redistricting plan, ignored the policies of the last legislatively-enacted plan, in a manner which is in conflict with an applicable decision of this court and contrary to important and fundamental public interests.

The Pennsylvania Supreme Court's Opinion, and the Master's Report, lack any consideration of the last legislatively-enacted plan in Pennsylvania. The court made no effort to determine the policies of that plan and to find a plan fit for court adoption that both protected voting rights and best conformed to the last expression of the will of Pennsylvania's legislature. This is in direct conflict with the decision of this court in *White v. Weiser*, 412 U.S. 783 (1973).

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[5] Petitioners are not asking the Court, though, to decide whether a minority influence district, or the lack of one, can give rise to a cause of action under section 2 of the Voting Rights Act.

In *White*, this Court held that the district court had appropriately concluded that the legislatively-enacted congressional redistricting plan violated the one man, one vote rule, but that the district court, in adopting its own congressional reapportionment plan, erred in not honoring valid state policies embodied in the unconstitutional enactment. The district court should have chosen a plan that contained the same basic district configurations as the unconstitutional apportionment statute while remedying the impermissible population variations. In reaching this conclusion, this Court noted that, while the plan chosen by the district court might have contained districts that were "more compact," the district court could not ignore "whatever state goals were embodied" in the unconstitutional reapportionment statute and which were kept in the proposed plan with the same basic district configurations. 412 U.S. at 796. This Court further stated: "'[T]he District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so.'" *Id.* (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

The Supreme Court of Pennsylvania did exactly what this court found to be error in *White*. The court ignored the last legislatively-enacted expression of state policy with respect to congressional reapportionment by failing to consider which of the plans before it was most consistent with the existing congressional reapportionment statute.

The Court's failure is illustrated by the changes it made to the congressional districts in and around the City of Pittsburgh. Under the statute, the Fourteenth Congressional District included the City of Pittsburgh and certain suburbs on its east side that have substantial African-American populations and which are not affluent. The Eighteenth Congressional District, under the same statute, surrounded the city in a horseshoe shape on the north, west and south sides. The communities in this horseshoe are largely white, affluent bedroom communities. The Supreme Court of Pennsylvania itself recognized that these suburban communities on

the north, west and south constituted a community of interests that was different than that of the city and its eastern suburbs. (Master's Report, Finding of Fact 28, Appendix at A43.)

What the Supreme Court of Pennsylvania failed to acknowledge was that this community of interests was recognized, and embodied as a legislative policy, in the previous redistricting statute. The court's plan broke up the horseshoe-shaped Eighteenth District and distributed it among four other districts. The inner-city district was combined with the northern suburbs. The western suburbs were combined with a district that extended outside the metropolitan area into other counties, and the African-American populations in the eastern suburbs joined not with the city but with, among other areas, affluent white suburbs in the northeast and south of the city.

As in *White*, there were plans proffered to the Supreme Court of Pennsylvania that were more consistent with the configurations of the last legislatively-enacted plan. The Loeper Amended Plan, for example, proffered by Petitioners, would have preserved both the horseshoe-shaped configuration of the Eighteenth District in the suburbs and maintained the African-American population of the Fourteenth District by joining the city and certain of its eastern suburbs. Like the plan initially rejected by the district court in *White*, it also had a lower population deviation than the Court's selected plan.

The decision of the Supreme Court of Pennsylvania stands in defiance of an important principle of federal law. Under article 1, section 4 of the United States Constitution, the prerogative of redistricting is given to the legislatures of the states, subject to congressional regulation. This Court has welcomed state courts to play an active role in redistricting litigation. *See e.g., Scott v. Germano*, 381 U.S. 407 (1965). It is very important, therefore, as state courts become more active, that they apply, and be held to, the same rigorous standards that prevail in federal district courts.

When a state court, as here, acts as a court of general jurisdiction in an area where its jurisdiction is concurrent with that of the federal courts the same standard should apply.[6] It should no more invent policies for the state in congressional redistricting than a federal court. This Court should act to assure that federal questions are addressed in a consistent fashion, regardless of whether the litigation is in federal or state court.

IV. The Pennsylvania Supreme Court erred in applying this court's decision in *Karcher v. Daggett*, 462 U.S. 725 (1983), in a manner that is an egregious departure from this court's guidance and that has important public consequences for Pennsylvanians.

In *Karcher*, this court articulated a standard by which a court must review a legislatively-enacted redistricting plan. The standard bifurcates the burden of proof. First, the plaintiff must demonstrate that the plan does not achieve the lowest practicable population deviation. Then, if that is established, the burden of proof shifts to the defendant, typically the state election officials, to demonstrate that "each significant variance between districts was necessary to achieve some legitimate goal." 462 U.S. at 731. As the court stated in *Karcher*:

> White v. Weiser demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even

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[6] Under article II, section 17 of the Pennsylvania Constitution (Appendix at A110), the Pennsylvania Supreme Court has a role in redistricting the state legislature that is quasi-executive and quasi-legislative as well as judicial. The Pennsylvania Constitution, however, is silent on congressional redistricting. The Pennsylvania Supreme Court was acting in this case solely as a court of general jurisdiction concurrent with that of the federal courts in congressional redistricting matters.

> if they require small differences in the population of congressional districts. . . . Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives.

Id. at 740 (citations omitted).

The Supreme Court of Pennsylvania erred by assuming that the legislative policies that this Court said "might justify" some variance were *per se* justifications that would overcome the deficiencies of a plan with less than ideal population deviation. The Pennsylvania Supreme Court's opinion merely cites the *Karcher* policies without stating why any policy, such as respecting municipal boundaries, is of any importance in Pennsylvania for congressional districts. The Pennsylvania Supreme Court also overlooked the fact that *Karcher* was referring to legislative policies rather than judicial policies. Such policies may be embodied in a state constitution, a previously enacted redistricting statute or in other state statutes. No such references were cited by Pennsylvania's Supreme Court.

Furthermore, *Karcher* requires that any stated justification for a population variance must have been consistently and uniformly applied throughout the state. The justifications given by the Pennsylvania Supreme Court, in addition to not being identified as state legislative policy, were also not consistently and uniformly applied.

The court, for example, attached importance to the avoidance of splitting political subdivisions. However, a review of the court's plan (Appendix at A76) shows that while there were no municipal splits in western Pennsylvania, there were numerous

municipal splits in eastern Pennsylvania. No explanation for the failure to apply this principle uniformly was given by the court.

A desire "to preserve communities of interest" (Appendix at A7) was another purported justification for population deviations that was not consistently and uniformly applied. The Master found that the City of Pittsburgh "has more in common with the close-in easterly suburbs and in the Monongahela Valley's former steelmaking areas than with the suburbs in the north, west and south." (Master's Report, Finding of Fact 28, Appendix at A43). However, as discussed above, in Part III of this Petition, the court's plan disregarded its own findings and split these recognized communities of interest. (*See* description and map of court adopted plan, Appendix at A69-70, A76-89.) This is in stark contrast to the plan's treatment of rural North Middleton Township. Other plans considered by the court placed the township in the Ninth Congressional District. The court chose to keep the township in the Nineteenth District because of evidence supporting the "affinity of North Middletown Township . . . with other communities in the Nineteenth Congressional District, rather than in the Ninth." (Master's Report, Finding of Fact No. 23, Appendix at A39.)

The Pennsylvania Supreme Court's misinterpretation of *Karcher* is compounded by the fact that *Karcher* does not apply at all. The court failed to perceive that *Karcher* applies to the review by a court of a legislatively enacted plan, while *White v. Weiser* sets the standard by which a court should proceed in adopting its own plan where a legislature has failed to act. Observing the distinction between *Karcher* and *White* is important since it is the only way to achieve the due deference to legislative policy that this Court has called for in all redistricting cases. Since fundamental federal constitutional rights are involved, it is also important that state courts adhere to the same standard as the federal courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Pennsylvania.

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Respectfully submitted,

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